United States - Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany

WT/DS213

Oral Statement of the United States at the
Second Meeting of the Panel

March 19, 2002

Mr. Chairman, Members of the Panel:

1. On behalf of the United States delegation, I would like to thank the Panel for this opportunity to comment on certain issues raised in this proceeding. We do not intend to offer a lengthy statement today. Instead, we will focus briefly on the central issues in this dispute.

2. Mr. Chairman, as we stated in our Oral Statement at the First Meeting of the Panel, this proceeding presents three basic questions. The first question is, does the United States act inconsistently with Article 21.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Anti-Dumping Agreement") by self-initiating sunset reviews without regard to the evidentiary provisions of Article 11.6? The second question is, does the United States act inconsistently with Article 21.3 by *not* applying the *de minimis* provisions of Article 11.9 in sunset reviews? The third question is, whether Commerce's determination in the sunset review on corrosion-resistant steel was based upon an appropriately conducted review of all relevant and properly submitted facts?

3. The purely legal issues – can an authority automatically self-initiate a sunset review? is there a *de minimis* standard applicable to sunset reviews? what are the evidentiary and procedural requirements applicable to sunset reviews? – are all addressed in the SCM

Agreement. This, of course, is no great revelation to any of us. Where the United States and the EC diverge, however, is on how the Panel should interpret what the SCM Agreement says on these issues.

4. Consistent with accepted WTO jurisprudence, the United States has argued that the Panel should interpret the SCM Agreement, and in particular Article 21.3, in accordance with the ordinary meaning of the terms of the Agreement in their context and in light of their object and purpose. This should be a straightforward exercise because the terms themselves are straightforward.

5. Simply put, Article 21.3 provides that a definitive countervailing duty must be terminated unless the requisite finding – likelihood of continuation or recurrence of subsidization and injury – is made. This likelihood finding is made in the context of a sunset review that, according to the explicit terms of Article 21.3, may be initiated on one of two bases – on an authority's "own initiative" *or* upon a "duly substantiated request" by or on the behalf of the domestic industry. There is no requirement in Article 21.3 or elsewhere in the Agreement to consider the magnitude of current subsidization in determining the likelihood that, absent the countervailing duty, subsidization would be likely to continue or recur. Finally, under the terms of Article 21.4, a sunset review must be conducted in accordance with the evidentiary and procedural requirements of Article 12. Commerce's sunset determination in corrosion-resistant steel comports with all of these terms of the SCM Agreement.

6. In contrast to the United States' text-based analysis, the EC makes various assumptions regarding the "purposes" of various provisions of the SCM Agreement *without* reference to the

text of the SCM Agreement, and then refers to obligations not found in the text which presumably derive from these "purposes." According to the EC, the Panel should derive the object and purpose of the SCM Agreement and then ignore the plain meaning of the words in order to achieve that object and purpose. This, of course, is the very antithesis of the basic principles of treaty interpretation reflected in Article 31 of the *Vienna Convention*.

7. For example, despite the plain text permitting initiation of a sunset review on an authority's "own initiative," the EC argues that the Article 11.6 evidentiary prerequisites for self-initiation of investigations must be satisfied in sunset reviews as well. Similarly, the EC reads a *de minimis* requirement into Article 21.3, notwithstanding that no such obligation exists. In both instances, the EC's arguments are based on its assumptions as to the purpose of investigations and sunset reviews. This approach to treaty interpretation runs afoul of the Appellate Body's admonition in *Japan - Alcoholic Beverages*, that "the treaty's object and purpose is to be referred to in determining the meaning of the 'terms of the treaty' and not as an independent basis for interpretation."[1]

8. In the *U.S. Shrimp* case, the Appellate Body rejected the EC's type of unconventional approach to treaty interpretation, stating that "[a] treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought."[2]

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[1] *Japan - Alcoholic Beverages*, p.11, n.20.
[2] *US Shrimp*, para. 114 (footnote omitted).

9. The Appellate Body went on to say that "[w]here the meaning imparted by the text itself is equivocal or inconclusive ... light from the object and purpose of the treaty as a whole may usefully be sought." The United States submits that the meaning imparted by the text of Article 21.3 is neither equivocal nor inconclusive. Article 21.3 states unequivocally, and without qualification, that authorities may initiate sunset reviews on "their own initiative." There is not a shred of textual support for the notion that some sort of evidentiary prerequisite applies to this explicit right. Similarly, Article 11.9 states unequivocally that the one percent *de minimis* standard applies in investigations. Again, there is not a shred of textual support for the notion that this standard *must* be applied in sunset reviews as well.

10. The Appellate Body in *U.S. Shrimp* also stated that "where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought." So let us consider for a moment whether the object and purpose of the treaty as a whole confirms the correctness of the United States' reading of the text.

11. The United States submits that the object and purpose of the SCM Agreement as a whole is to define certain trade distorting practices, that is, subsidies, and to establish a framework for addressing such practices, for example, application of countervailing measures. Both the definitions and the framework reflect a carefully negotiated balance of obligations and rights – obligations to, for example, eliminate certain types of subsidies, and rights to, for example, take countervailing measures against certain types of subsidies.

12. The United States' reading of the text of Article 21.3 – that it permits automatic self-initiation of a sunset review and that it contains no explicit requirement to quantify the current rate of subsidization when considering the likelihood of continuation or recurrence of subsidization – is consistent with the notion that the SCM Agreement sets out an agreed upon framework for addressing trade distorting practices. In other words, the SCM Agreement recognizes that it is appropriate to continue to apply countervailing measures where trade distorting practices are likely to continue or recur absent that countervailing measure.

13. In addition to the general legal issues just discussed, the EC also has made case-specific claims regarding Commerce's sunset determination involving corrosion-resistant carbon steel flat products from Germany. Commerce's determination – that the expiry of the countervailing duty order would be likely to lead to the continuation or recurrence of subsidization – is based on the *continued existence and availability* of programs previously found to have been used by German producers and the continued existence of benefit streams from programs previously found to benefit German producers.

14. The EC has focused almost exclusively on the Capital Investments Grant, or CIG, program, arguing that the benefit stream that continues to exist after the five-year mark is very small. The United States has already demonstrated that there is no *de minimis* standard in the Agreement with respect to sunset reviews and the fact that a benefit stream continues after the five-year mark can be a basis for finding likelihood of continuation of subsidization. As important in Commerce's likelihood determination, however, are its findings concerning the

continued existence and availability of subsidy programs previously found to have been used by the German producers.

15. In particular, Commerce determined that the Aid for Closure of Steel Operations and the ECSC Redeployment Aid under Article 56(2)(b) programs continue to exist. The EC has admitted as much in its Oral Statement. In addition, during the sunset review itself, the German Government, the EC, and German producers admitted that both of these programs continued to provide some benefits. Commerce's findings regarding these programs remain undisputed and unrefuted by the EC. Thus, with or without the CIG program, an "objective assessment" of Commerce's determination supports its finding of likelihood of continuation or recurrence of subsidization beyond the five-year mark.

16. Finally, we would like make a few points with respect to the February 28th ruling of the U.S. domestic court mentioned in the EC's March 4th letter to the Panel. A WTO panel is required to construe the meaning of a treaty provision and the consistency of, for example, a U.S. statutory provision, with that treaty provision. In contrast, a U.S. domestic court is required to interpret the U.S. statutory provision itself. The United States' domestic court in the *Dillinger* case did just that; it did not interpret the WTO SCM Agreement or the consistency of U.S. statutory provisions with the SCM Agreement.

17. Second, the decision is interlocutory. In other words, it is not a final court decision. The Court has remanded the case back to the U.S. Department of Commerce to consider the Court's ruling and issue a new administrative determination. The Department of Commerce is in the process of doing just that in order to issue a redetermination on remand.

18. Third, although we are in the process of analyzing the Court's ruling, as an initial matter we believe that the Court's ruling is wrong as a matter of U.S. law on a number of issues.

19. Finally, we note that the U.S. Government, and private parties, have the right to appeal a Court of International Trade ruling and frequently do so. As a result, decisions of the Court of International Trade are often reversed by the appellate court. Thus the EC's desire for the Panel to consider and be guided by the U.S. domestic court's interlocutory ruling is misplaced.

20. The United States would like to highlight and respond to two points in the oral statement of the EC today. Of course highlighting these two points is not to imply agreement with the other points contained in that statement.

21. First, in paragraph 5 of that statement, the EC says that the interpretation advanced by the United States in this proceeding "is not a good faith interpretation." The United States is quite surprised to see such a statement and takes sharp exception to this characterization. It should be obvious by now that the U.S. interpretation is offered in good faith. It is completely inappropriate for the EC to make such a claim.

22. Second, the United States notes that the EC has referred to "uncertainty and predictability" in its oral statement, for example in paragraph 41 and elsewhere. In paragraph 41 the EC has said that the U.S. measures at issue are inconsistent with the WTO because they "create uncertainty and unpredictability in international trade." The EC is again reading words into the text. The EC apparently is confusing the language in Article 3.2 of the DSU, which is a narrative statement that the WTO dispute settlement system is a central element in providing security and predictability to the multilateral trading system, with some obligation on Members

to provide security and predictability in international trade through their measures. There of course is no such vague obligation in the WTO.

23. This concludes our presentation today. We will be pleased, of course, to answer any questions you may wish to pose. Thank you.